

IN RE ATTORNEY GENERAL'S
"DIRECTIVE ON EXIT POLLING:
MEDIA AND NONPARTISAN PUBLIC
INTEREST GROUPS" ISSUED JULY 18,
2007

American Civil Liberties Union
of New Jersey, Appellant

Anne Milgram, as Attorney
General and Chief Elections
Officer of New Jersey,
Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-543-07T1

Sat below: The Honorable
Anne Milgram, as Attorney
General and Chief Elections
Officer of New Jersey

BRIEF AND APPENDIX OF *AMICUS CURIAE*
DEPARTMENT OF THE PUBLIC ADVOCATE OF NEW JERSEY

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PRELIMINARY STATEMENT

In July 2007, the Attorney General promulgated a "Directive on Exit Polling: Media and Nonpartisan Public Interest Groups" (hereinafter, the "Directive") that imposes new rules upon civil rights and election protection groups about how they assist voters and collect information about election problems. Other provisions of the Directive create a novel statewide permitting scheme for exit polling, administered by county election boards. The Directive further requires the approximately 6,300 local boards of election to enforce new mandates about what conduct is permissible outside polling places. In addition, the Directive substantially changes prior interpretations of the election law about activity near the polls and limits the rights of the voting public to receive meaningful help from nonpartisan election groups and observers.

This appeal presents significant legal issues on at least three interpretive levels. On the constitutional level, the ultimate question posed is whether the free speech and association clauses of the First Amendment to the United States Constitution, and Article I, paragraphs 6 and 18 of the New Jersey Constitution, permit the state to prohibit certain categories of speech and limit other categories of speech within a prescribed distance of a polling place. Even if the answer to the first question is affirmative, the statutory issue presented

is whether the Legislature could have intended prohibitions against electioneering, loitering, soliciting, and the display of campaign material contained in N.J.S.A. 19:34-6, -7, and -15 to authorize regulations prohibiting communications that do not solicit or suggest support for any candidate, party or public question.

Without at all seeking to diminish the importance of these constitutional and statutory issues, Amicus Department of the Public Advocate focuses in this brief on the third level of inquiry: whether under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -25 ("APA"), the Attorney General's Directive could be validly promulgated without abiding by the procedural requirements of rulemaking contained in the APA.

Amicus Department of the Public Advocate believes that faithful adherence to the principles of due process inherent in the APA's requirements for agency rulemaking might possibly have avoided the constitutional questions now before the Court. Because the Directive restricts expressive activity, it must be narrowly tailored to avoid intruding on constitutional rights, and any ambiguity or vagueness can be fatal to its validity. In these circumstances, the added caution and deliberation that result from public vetting of draft regulations has obvious positive benefit. But even if the constitutional questions could not have been thereby avoided, the public notice, scrutiny

and comment that result from enforcement of the APA have independent value, by limiting the power of agency officials unilaterally to impose, without compliance with statutory procedures, general rules that affect a broad swath of the public.

There is no dispute that the Attorney General issued the Directive without complying with the APA. Well established case law, however, prevents far-reaching, new policies such as this Directive from being implemented unilaterally by administrative order or decree. Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984).

The practice of assisting voters in exercising the franchise has a long and honorable history in the United States and in New Jersey. But that history also includes instances of governmental interference. By imposing substantial regulations on voting rights work, the Attorney General is creating a risk that citizens will be deprived of this valuable assistance. At a minimum, proposals to regulate this kind of civil rights work require the kind of thorough vetting that only the formal rulemaking process can provide, but which was missing here.

Because the Attorney General's expansive Directive has all of the indicia of rulemaking under the criteria described in Metromedia, and was issued without complying with the APA, it is void.

INTEREST OF AMICUS CURIAE¹

The Department of the Public Advocate is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27EE-57. The law defines the "public interest" broadly to include an "interest or right arising from the Constitution, decision of courts, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27EE-12.

The ultimate and enduring mission of the Department of the Public Advocate remains the same as when it was originally created in 1974, and when the Supreme Court described it in 1980: "to hold the government accountable to those it serves and . . . [to] provide legal voices for those muted by poverty and political impotence." Township of Mount Laurel v. Dep't of the Pub. Advocate, 83 N.J. 522, 535-36 (1980).

¹ Appendices are cited as follows:

The appendix of Appellant ACLU-NJ, submitted with its merits brief is cited as 1a, 2a, etc.

The appendix of Respondent Attorney General, submitted with its brief in opposition to the motion for preliminary injunction is cited as Ra1, Ra2, etc.

The appendix of amicus curiae Department of the Public Advocate, submitted herewith, is cited as DPA1a, DPA2a, etc.

It is the judgment of the Public Advocate that this case implicates the "public interest," N.J.S.A. 52:27EE-12, because it concerns the rights of civil rights workers to assist and inform voters, and the right of voters to receive such assistance. Moreover, this case implicates principles of due process that limit the ability of an agency to adopt rules without appropriate notice and opportunity for comment.

The Public Advocate has previously submitted comments to the Attorney General about the legal rights of exit pollsters and election-protection workers to interact with voters near their polling places. (62a-69a.) In addition, the Public Advocate's Voting Rights Campaign has been extensively involved in advocating for the rights of eligible voters to register to vote, to cast ballots, and to have their ballots fairly counted. Among other things, the Public Advocate has released reports documenting extensive problems with the accessibility of polling places to voters with disabilities. The Department also submitted written and oral testimony during four days of hearings before the State Voting Machine Examination Committee on the need to assure reliability, accuracy, privacy and security in the State's complement of voting machines. (See generally Public Advocate's Notice of Motion to Appear as Amicus Curiae (filed Jan. 2, 2008) ("Amicus Motion").)

In court, the Public Advocate has appeared as amicus curiae in Gusciora v. Corzine, No. MER-L-2691-04 (Law Div.) (2007), also addressing the need for thorough testing and certification before voting machines with paper trails are adopted for use in New Jersey. In addition, during the most recent general election on November 6, 2007, the Department represented, either directly or as amicus curiae, 32 voters denied the right to vote. (See Amicus Motion.)

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This appeal arises from a "Directive on Exit Polling: Media and Nonpartisan Public Interest Groups" (the "Directive") issued by the Attorney General of New Jersey ("Respondent") on July 18, 2007. (3a-4a.) An explanatory letter, also dated July 18, 2007, from an Assistant Attorney General, accompanies the Directive. (5a-7a.) Respondent issued the Directive and the July 18, 2007, letter without the formal rulemaking required by the New Jersey Administrative Procedure Act (APA). The Directive does not merely affect the ability to perform exit polling (as suggested by its title). Rather, it sweeps more broadly, regulating election protection advocates who educate voters and help them learn and enforce their rights at the polls, as well as the voters themselves.

Appellant American Civil Liberties Union of New Jersey (ACLU-NJ) appeals certain provisions of the Directive pursuant to R. 2:2-3(a). (1a-2a.) ACLU-NJ has also moved for a preliminary injunction to enjoin enforcement of the offending provisions of the Directive.

Before turning to the terms of the Directive under appeal, amicus will describe what exit polling and election protection activities are, outline the history of election protection activity, and review the regulation of such activity and exit polling in New Jersey. Amicus will then address the process that led to the issuance of the Directive and discuss its terms and impact.

A. Description of Exit Polling and Election Protection

Historically, "exit polling" has referred to the process of interviewing a sample of voters who are exiting the polls about how they voted in the election. (65a.) Participation is voluntary and non-coercive; voters remain free to refuse to answer questions or otherwise interact with the pollster, and of course, it could not influence a voter that the voter has already cast. (65a-66a.) Exit polling is generally, but not exclusively, conducted by media organizations or their designees. (Id.)

One civil rights group, the Asian American Legal Defense and Education Fund (AALDEF) understands exit polls to include asking voters leaving the polls, not who they voted for, but rather how they experienced the voting process. Such questions might include, for example, whether poll workers were respectful or knowledgeable about election laws; whether there were improper demands for identification; or whether multilingual voting materials were present. (70a-75a; see also 8a (Letter to Assistant Attorney General Donna Kelly from Ed Barocas, ACLU-NJ Legal Director dated July 27, 2007) ("numerous [exit pollsters] do not poll regarding how voters voted but, rather, ask questions relating to voters' experiences at the polls and what barriers to voting might have been encountered."))

"Election protection" activity is broader and in some respects different from exit polling.² Election protection includes non-coercive and nonpartisan observation of election activities; education of voters about their rights and responsibilities at the polls, through dialogue or the distribution of printed material; and assistance to voters

² The Attorney General has previously noted that exit polling is different from election protection or similar activities. For example, in an October 24, 2006, letter, the Attorney General sought the views of some selected persons about three separate issues: "exit polling," the "distribution of voter rights pamphlets" by nonpartisan groups, and the "approach of voters by representatives of nonpartisan public interest groups . . . for any purpose." (53a).

attempting to understand and exercise their right to vote.

(66a.) It often involves handing out printed information about voting rights to voters as they enter the polls (83a-84a), but such information makes no mention of parties, candidates, or public questions (84a, ¶ 3).

As Amicus uses these terms, neither election protection nor exit polling is an attempt to influence or suppress a voter's choices on the ballots. Consequently, it is qualitatively different from "electioneering" - which is advocacy for or against a particular party, candidate or ballot question. (65a, 70a, 77a.) Likewise, neither election protection nor exit polling represents an effort to "interrogate prospective voters as to their qualifications" to vote (see Ra 3) or to "impede, prevent, or otherwise interfere with the free exercise of the elective franchise by any voter." N.J.S.A. 19:34-29. Consequently, it is not activity independently prohibited by laws or court decrees barring voter suppression.

B. History of Election Protection: from the Civil Rights Era to the Present

The voter education efforts practiced by nonpartisan election protection workers today follow in the tradition of the groundbreaking work done by earlier civil rights groups since at least the 1960s. In 1961, leaders of the Student Nonviolent Coordinating Committee created a voting rights wing within their

organization and established several voter registration schools. Raymond Arsenault, Freedom Riders: 1961 and the Struggle for Racial Justice 398 (2006). During the same time period, members of the National Association for the Advancement of Colored People (NAACP) fought for voting rights despite violent reprisals. Minne Finch, The NAACP, Its Fight for Justice 212 (1981). These "Freedom Riders" printed and handed out mimeographed copies of the Constitution in an effort to educate and register voters. James Forman, The Making of Black Revolutionaries 281 (1997). In an early form of election protection, they also accompanied individuals to polling places to cast ballots. Id.

The federal response to this early election protection work was to offer clear protection to these activities. In passing the Voting Rights Act of 1965 (the "VRA"), 42 U.S.C. § 1973, Congress broke down legal barriers at the state and local levels that had prevented African-Americans from exercising the right to vote. Civil Rights Movement, Encyclopedia Britannica, 339 (15th ed., vol. 3) (1998). Among the VRA's provisions was a bar on intimidation, threats or coercion against anyone who is "aiding [another] person[] to vote or attempt to vote." 42 U.S.C. § 1973i(b).

Carrying on the commitment to voting rights, several groups across America continue to engage in election protection efforts

today. During the 2004 presidential election, for example, more than 25,000 poll monitors were deployed throughout the United States. Phoebe Connelly, Making Every Vote Count, Institute for Public Affairs In These Times, Nov. 15, 2004, at Frontline 10 (DPA1a-2a). The groups staffed voter help lines and distributed "Voters' Bill of Rights" documents at the polls. Id.³

Since at least the 2004 general election, it has become common practice for nonpartisan volunteers in New Jersey to go to polling places on Election Day in an effort to ensure that voters are aware of their rights. Several groups including, but not limited to, People for the American Way Foundation, and the Asian American Legal Defense and Education Fund, and appellant

³ See also Diane Carman, Organizations Mobilize Amid Fears of Voting Fraud, The Denver Post, July 15, 2004, at B5 (DPA3a-4a) (describing groups passing out copies of the Voters' Bill of Rights to people "as they enter the polling place"); Caren Burmeister, Beaches Voters Go Strong for Bush, Florida Times-Union (Jacksonville), Nov. 6, 2004, at L1 (DPA5a-6a) (recounting how volunteers distributed the Florida Voters' Bill of Rights at the polls); Yawu Miller, Students Monitor Hub Polling Places, Bay State Banner (Massachusetts), Vol. 40., No. 13, at 9 (Nov. 11, 2004) (DPA7a-8a) (discussing students who witnessed a "wide range of violations of voters rights" as they handed out copies of a "voters' bill of rights"); Carol Biliczky, Protection for Election; National Group Offers Legal Aid in Case Voters are Turned Away From Polls Nov. 2, Akron Beacon Journal (Ohio), Oct. 14, 2004, at A14 (DPA9a-10a) (describing volunteers distributing Ohio voters' bill of rights in heavy minority populated polling places throughout Ohio); and Jerome L. Sherman, Volunteers Monitoring Polling Places; Nonprofit Group Protects Each Individual's Right To Vote, Pittsburgh Post-Gazette (Pennsylvania), November 2, 2004, at A7 (DPA11a-12a) (discussing the deployment of lawyers and volunteers at polling places who will issue a "Voters' bill of Rights . . . to every voter").

in this case, the ACLU-NJ, sent poll monitors to various sites statewide during the 2004 General Election to participate in election protection activities. Voting Rights Coalition Implements New Jersey Election Protection 2005 Project, The Italian Voice, Vol. 74, No. 18, at 1 (2005) (DPA13a-14a). These and other groups have since collaborated to create "Election Protection Project[s]" which seek to continue to monitor polling places, provide voter-hotline support, and participate in other election protection activities. Id.

C. The State's 1972 Opinion about Exit Polling

The record shows that in 1972, the Attorney General issued an opinion stating that exit polling should be prohibited. (12a.)⁴ The 1972 opinion declared that under State laws barring electioneering, loitering, voter solicitation, or the obstruction of polling places,⁵ "exit polling was deemed, per se, to constitute an impermissible obstruction" of the voter's right

⁴ The 1972 opinion is not part of the agency record here. However, a 1988 opinion of the Attorney General about exit polling (12a-17a) discusses the terms of the 1972 opinion at some length. We discuss the 1988 opinion in § D of the Statement of Facts, infra.

⁵ The cited statutes, N.J.S.A. 19:34-6, 7- and -15, have not been materially amended since 1948, except that in 2005, the Legislature amended N.J.S.A. 19:34-6 to state that "loiter[ing] in or near" the polling place was prohibited, as opposed to merely loitering "within any polling place." Thus, the differing interpretations accorded to these statutes since they were first adopted cannot be attributed to statutory amendments.

to have "complete freedom of movement entering and leaving" the area within 100 feet of the polls. (14a.)

The 1972 document has been variously characterized by the Attorney General's Office as an "opinion" or an "interpret[ation]," but not a directive. (Letter to Secretary of State Jane Burgio from Deputy Attorney General David Dembe dated June 2, 1988) (12a, 14a).) Moreover, there is no evidence that the 1972 document differentiated among election protection activity, "traditional" exit polling that sought information about a voter's choices, and the more modern and expansive exit polling, which includes collecting information about a voter's experience in, or problems with, voting.

D. The State's 1988 Opinion About Exit Polling

Sixteen years later, the State changed course for the first of several times in its view about what activities outside polling places were permissible. In a 1988 document that contained "advice" about exit polling (12a) and "suggestion[s]" about how to train district boards of election about the applicable law (17a), the State relaxed its prior views about exit polling and took the position that "exit polling conducted outside the actual polling place but within 100 feet of the entrance is not, per se, prohibited." (12a.) The opinion cautioned that in accordance with State law, exit polling could

not "obstruct the entrance to the polling place or . . . interfere with any voter entering or leaving the polls." (Id.)

The 1988 opinion relied on two then-recent decisions - Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir. 1988) and CBS Inc. v. Smith, 681 F. Supp. 794 (S.D. Fla. 1988) - that invalidated, respectively, a Washington statute expressly prohibiting exit polls and a Florida "anti-solicitation law." (13a-14a.) Both decisions, the opinion explained, acknowledged that "the general public's right to engage in non-obstructive speech" had to be balanced against "the state's legitimate interest in preserving order and decorum at the polls." (14a-15a.)⁶ In light of these decisions, which the Attorney General found persuasive, the opinion concluded that "electioneering, or obstruction or interference with voting," along with exit polling inside the "polling place or room" remained prohibited. (16a.) However, the opinion allowed exit polling within the

⁶ The State undisputedly has a legitimate interest in suppressing voter intimidation, threats or coercion. As illustrated by the Consent Order in Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 81-3876 (D.N.J. Nov. 1, 1982), the government may legitimately suppress - and has suppressed - voter intimidation and threats by armed men appearing to the observer to be law enforcement who are specifically targeting minority voters (Ra 2-3, ¶¶ 2(d)-(g).) However, it does not follow that this narrowly tailored response to a specific problem can ever justify broad suppression of voter advocacy activities by unarmed civil rights volunteers, and certainly not without the kind of thorough vetting of the proposal that would come from compliance with the APA.

100-foot zone that did not interfere with, impede, or obstruct voter access to the polling place. (Id.)

Most significantly, the Attorney General's advice acknowledged that a bar on free speech outside the polls created serious First Amendment issues. Thus, the advice was to examine each situation "on a case-by-case basis" rather than to enforce an outright ban on exit polling. (Id.) While the opinion generally acknowledged the First Amendment interest in the "general public's right to engage in non-obstructive speech," (14a), it did not specifically impose constraints or discuss election protection work. Still, the opinion disfavored "broad prohibitions" on expressive activity outside the polls, in favor of a more nuanced inquiry into whether specific conduct had the actual effect of obstructing or interfering with voters. (Id.)

Lastly, the 1988 opinion aptly observed that the thousands of members of district boards of election and local police would be the primary parties responsible for enforcing decorum in and in the immediate vicinity of the polls. (16a-17a.)⁷

⁷ A district board of election, which serves a single election district, comprises at least four people. N.J.S.A. 19:6-1. There are approximately 6,341 election districts in the State. Fitzgerald's Legislative Manual (2007 ed.) at p. 918.

E. The August 2006 Letter and the September 2006 Draft Directive Delineating the Rights of Exit Pollsters and Election Protection Workers

Eighteen years later, the State again re-examined and amended its prior opinions that affected exit pollsters and election protection workers.

There is no evidence in the record of any prior Attorney General opinion or directive specifically prohibiting the civil rights work performed by election protection volunteers. On the contrary, some civil rights groups have stated that enforcement of a bar on election protection work in the 100 foot zone around the polls "has been erratic in the past." Geoff Mulvihill, Some Election Watchers won't get a view as close as they'd like, Associated Press, Nov. 1, 2004. (DPA15a-16a.) Nevertheless, civil rights workers have claimed harassment by government officials during the 2005 and 2006 elections. In particular, some election officials allegedly chased some election protection volunteers away from polling sites even if they remained outside the 100-foot "no electioneering" zone, while others have been falsely accused of unlawful electioneering, a crime. (18a, 70a.)

Responding to these concerns, the Attorney General opined that these nonpartisan election protection activities within 100 feet of the polls were generally lawful. Specifically, the

Attorney General "determined," in an August 31, 2006, letter, that nonpartisan groups, in addition to "the media," "will be able to" exercise their rights to conduct "exit polling" within 100 feet of polling place entrances. (24a.)

In addition to extending the rights of public interest groups to conduct exit polling, the determination went further. The August 2006 letter authorized nonpartisan public interest groups to "offer voter rights pamphlets to voters who are entering or exiting the polling place." (24a-25a.) The determination provided that "exit polling and pamphleteering" would be allowed provided that it did not occur within the polling place and was not disruptive of the election and promised a "draft directive" that would codify this ruling. (25a.)

On September 13, 2006, the Attorney General circulated the promised draft directive regarding exit polling" to codify these determinations. (26a (emphasis in original).) The accompanying letter, addressed to "County Election Officials," invited comments on the draft directive "as soon as possible," so that the Attorney General could "issue a final directive for use in the upcoming November election."⁸ (26a.)

⁸ Although the Attorney General directed the draft solely to the county election boards and election superintendents, it appears from the responses (e.g., 29a-31a, 34a-35a, 37a), that at least
Footnote continued . . .

The draft directive preserved the rights of exit pollsters and election protection workers to offer voting rights pamphlets to entering voters, provided the material did not "reference any candidate, political party or group, or referendum." (28a, ¶ 11.) The draft directive, however, also both proposed new constraints on exit pollsters and election protection workers and a new scheme of election permits. First, it required election groups to register with the county elections boards two weeks before the election, stating the polling places where they would be operating. (27a, ¶ 1.) It required county boards to issue authorization letters to these groups. (Id., ¶ 2.) Another section required individual exit pollsters to display credentials stating their name and organization. (Id., ¶ 3.)⁹ Next, it barred exit pollsters from anywhere inside the building where the polling place was located, but allowed them to operate within 100 feet from the outside entrance. (28a, ¶¶ 6-7.)

a select few organizations also received the draft. Nevertheless, this draft, as with all other opinions, advice, and directives relating to exit polling and election protection discussed here, was not published in the New Jersey Register or other publications, nor is there any evidence that the call for comments was posted on the relevant websites of the Department of Law and Public Safety (including the Division of Elections).

⁹ The draft directive stipulated that election protection workers had to "display credentials" but did not specify who had the responsibility to generate those credentials. (27a, ¶ 3). The final Directive changed this initial plan and required the county boards to provide the credentials to be worn. (3a, ¶ 3); see also infra n. 11.

Finally, it also allowed district board workers to issue orders to exit pollsters "to assure the orderly conduct of the election" and required exit pollsters to comply with those orders. (Id., ¶ 10.)

The draft directive yielded a few responses from interested parties. (28a-45a.) While some groups thought that the draft directive was too restrictive (29a-31a), others thought the directive gave too much leeway to the civil rights groups that perform exit polling and election protection functions (32a-37a, 40a-45a). Nevertheless, there was widespread agreement among the commenters that the draft directive represented a new and aggressive interpretation of the relevant election statutes that was either ultra vires, would be a substantial change in existing policy and practice, and/or constituted an improper attempt at rulemaking. Specifically:

- ACLU-NJ stated that the relevant election statutes "fail to provide the Division of Elections with the authority to adopt its proposed restrictions . . . [T]he Draft Directive run[s] contrary to the will of the legislature." (29a);

- The Camden County Board of Elections declared that the Directive was "in direct contradiction to the mandates of Title 19" and if implemented, would "wreak havoc for the Boards of Elections." (32a-33a);

- The New Jersey Association of Election Officials (NJAEI) stated that the draft directive "appear[s] to be in the rubric of rulemaking or legislative action" and "contravenes the letter and policy of Title 19." (34a-35a); and

- The Bergen County Superintendent of Elections wrote that "[t]his directive . . . contradicts state law . . . [O]nly the legislature can make law or modify Title 19" and that "[t]his is another example of the A[ttorney] G[eneral] overstepping their authority . . . [T]he A[ttorney] G[eneral] does not have the authority to make and change laws." (41a.)

F. The October 2006 Letter Revoking and Altering Prior State Policy on Exit Polling and Election Protection

The Attorney General responded to the initial round of comments in an October 24, 2006, letter. (50a-51a.) In this letter, he began by summarily revoking the August 31, 2006, letter that had allowed civil rights workers near polling places to help voters and provide voting rights materials. (Id.)

Moreover, the Attorney General declared that he was rejecting the "case-by-case" approach advanced in the 1988 opinion (16a), i.e., to determine on an individualized basis whether a particular person's conduct near the polls was an exercise of First Amendment rights that must be allowed, or an

interference with or obstruction of voters that could be regulated (14a-16a).

Instead, the Attorney General declared, he was changing policy and directing that all civil rights workers were to be excluded from the area immediately surrounding the polls without regard to how their particular conduct affected voters:

For the November 2006 election, please continue to permit exit polling consistent with the Attorney General's opinion dated June 2, 1988. Furthermore . . . please do not permit either the distribution of materials within 100 feet of the entrance to voters who are entering or exiting the polling place or the approach of voters by non-partisan public interest groups within 100 feet of the entrance of the polling place. (51a).

Simultaneous with this letter, the Attorney General solicited the additional views of a small, select group (which included the Public Advocate) on the issue of exit polling and the distribution of voting rights pamphlets and the approach of voters by nonpartisan groups. (See 46a-57a.) The groups solicited for comments did not include media organizations who might engage in exit polling. In seeking such input, the Attorney General acknowledged that the rights of exit pollsters and civil rights workers volunteering their time at the polls was a complex and "important" issue having numerous "legal, policy, and logistical implications." (46a.)

The letter or the solicitation for comments was not published in the New Jersey Register or any other official

source. Indeed, there is no evidence that the Attorney General even posted the proposal on a government Internet site or announced it to the news media.

On November 27, 2006, the Attorney General extended the deadline for comments to February 1, 2007. (Ra72-76.) Again, this extension was not published in the New Jersey Register, and there is no evidence it was posted on the Internet, or circulated to the news media. By the extended deadline for comments, some additional groups offered responses, including the Public Advocate (see [http://www.state.nj.us/publicadvocate/home/reports/pdfs/FINAL Letter to Rabner re exit polling and election protections .pdf](http://www.state.nj.us/publicadvocate/home/reports/pdfs/FINAL_Letter_to_Rabner_re_exit_polling_and_election_protections.pdf)) with most opposing the proposed policy. (58a-78a.)

G. The July 2007 Directive and the Interpretive Letters

On July 18, 2007, Respondent issued the Directive. (3a-4a.) Addressed to the "County Boards of Election" and the "County Superintendents of Election,"¹⁰ the Directive was

¹⁰ Although all counties have boards of election, only ten counties have superintendents of election. See Assembly State Government Committee Statement to Assembly Bill No. 4157 (May 14, 2007) ("ASG Statement"), available at http://www.njleg.state.nj.us/2006/Bills/A4500/4157_S1.PDF (last visited Jan. 21, 2008); see also http://www.state.nj.us/lps/elections/loc_officials_doe.html (last visited Jan. 18, 2008). In counties with superintendents of election, the superintendent acts as the voting registration commissioner and generally "enforces most of the election

Footnote continued . . .

circulated to at least some of the individuals who had submitted comments on the draft directive. Accompanying the Directive was an interpretive letter.

The Directive, among other things, provides that exit pollsters must submit "a letter to the applicable county board of election, identifying polling place locations where exit polling is to be conducted," at least two weeks before an election. (3a, ¶ 1.) County boards are required to issue the authorization letter, but the Directive specifies no deadline for issuing it. (Id., ¶ 2.) The letter also directs county boards to "provide[]" credentials to the individual exit pollsters containing the pollster's name and organizational affiliation." (Id., ¶ 3.)¹¹ Exit pollsters must "display" these credentials while on duty. (Id.)

statutes in Title 19 of the Revised Statutes." ASG Statement at p.1.

¹¹ This newly amended provision requires the group conducting the exit polling to prepare its list of volunteers, to select the places where they will be deployed at least two weeks before the election, and to submit this list of names and places to the county board. (3a, ¶¶ 2-3.) According to ACLU-NJ, this is a burdensome if not impossible exercise. (85a, ¶ 8.)

Moreover, because the list of names and places is probably a public record under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, and the election records statute, N.J.S.A. 19:10-1, the Directive at least implicates the privacy rights and confidential strategies of election protection organizations by exposing their members' names and monitoring plans to public view.

Next, the Directive orders that any person "conducting an exit poll cannot poll, assist, or offer materials to voters entering the polling place." (4a, ¶ 11.) While the Directive never defines what "exit polling" is (despite substantial differences of opinion about its proper definition), the Directive allows this "exit polling" within the 100-foot boundary from the outside entrance to the polling place but not inside the polling place itself, or the building housing the polling place. (Id., ¶¶ 6, 7.) Finally, the Directive places the responsibility for enforcing orderly conduct at the polls on any "election official or authorized representative," (id., ¶ 10), which as a practical matter, means the 25,000 members of the district boards of election (see 33a (complaining that enforcement of the Directive will "wreak havoc" on local boards and that it would be "impossible" for county boards to undertake enforcement))).

The letter accompanying the Directive conveys additional information, some of which is explanatory, but some of which creates new questions. (5a-7a.) For example, the letter purports to ban all assistance to voters (5a) while the Directive only bars it as to voters "entering the polling place" (4a, ¶ 11). The letter also states that the "distribution of materials" is prohibited as to all voters within the 100-foot zone (5a) while simultaneously asserting that "[a]pproaching a

voter before he or she enters the polling place, whether it be to offer assistance, distribute pamphlets, or ask questions" is legally different from performing such activities when a voter "exit[s] the polling place." (6a (emphasis added).)

The ambiguities in both the Directive and the letter yielded additional questions. (8a-9a (inquiries of ACLU-NJ); 79a-81a (inquiries of election officials' association.)) For its part, the ACLU-NJ sought clarification of the term "exit polling," and requested clarity as to whether this term included questioning voters about their experience in voting, as opposed to their electoral choices. (8a.) In addition, confused by the apparently contradictory terms of the Directive and the interpretive letter, the ACLU-NJ asked whether voter rights cards could be given to exiting voters, but not entering ones. (Id.) Moreover, addressing another ambiguity, the ACLU-NJ asked whether groups that were not conducting exit polls, electioneering, or otherwise interacting with voters on election matters, could operate within 100 feet of the poll entrance under the Directive. (Id.)

In reply, Respondent issued another interpretive letter in October 2007. (10a-11a.) This letter defines "exit polling" to include inquiries about the voting experience and any problems in casting a ballot. (10a.) It also bars the distribution of literature to both exiting and entering voters, effectively

expanding the terms of ¶ 11 of the Directive that only reached entering voters. (Id.) Finally, the October letter indicates that only credentialed exit pollsters can operate within the 100-foot exclusion zone, and bars the "activity" of all other groups. (Id.)

The NJAEO also complained about the ambiguity in the Directive. It argued that the Directive was flawed for failing to define what constituted a "non-partisan" group entitled to obtain exit poll credentials and that in the absence of such a definition, the word could be construed too broadly. (79a-80a.) The record contains no evidence of a reply to the NJAEO's concerns.

ARGUMENT

I. THE JULY 2007 DIRECTIVE, BROADLY REGULATING THE ASSISTANCE AVAILABLE TO VOTERS, AS WELL AS THE CONDUCT OF NONPARTISAN CIVIL RIGHTS GROUPS, THE MEDIA, AND THOUSANDS OF COUNTY AND DISTRICT ELECTION OFFICIALS, REQUIRES FORMAL RULEMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act ("APA"), adopted in 1969, was meant to promote fairness and transparency in the actions of the State's administrative agencies. In Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 330-31 (1984), the Court explained:

The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that should surround the ultimate agency determination . . . These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information . . . and the opportunity for continuing comment on the proposed agency action before a final determination.

The APA thus codifies the principle that responsible and responsive governmental agencies must practice transparency and openness in their dealings with the public. See I/M/O Dep't of Ins.'s Order Nos. A89-119 and A90-125 and the Adoption of N.J.A.C. 11:3-16A, 129 N.J. 365, 383 (1992). As the Supreme Court also recently noted in linking the APA to general norms of due process:

[A]dherence to due process has always been integral to the regulatory process. Even before adoption of the Administrative Procedure Act, we emphasized that

"[w]ithout sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions." Boller Beverages, Inc. v. Davis, 38 N.J. 138, 152 (1962).

"[A]dministrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules" in order to satisfy due process and produce reasoned and principled decisions.

Cooper Univ. Hosp. v. Jacobs, 191 N.J. 125, 143 (2007).

This Court has also explained how public participation in rulemaking helps both the government and regulated persons:

The primary goal of the Administrative Procedure Act is "to permit greater public participation in and familiarity with administrative processes, by requiring advance notice of the intention to promulgate rules and by requiring notice of hearings containing information of assistance to participants in such hearings." Such administrative measures have been viewed as "of inestimable value in promoting public understanding of and cooperation with the State Government." Therefore, where agency policy is adopted internally, without proper promulgation and allowance for comment, it should not be binding, since there has been no opportunity for public input and no public awareness of the rule with which the public is supposed to comply.

Bd. of Educ. v. Cooperman, 209 N.J. Super. 174, 202 (App. Div. 1986).

The formalities required by the APA are necessary not "just as a matter of fairness but also as 'a means of informing regulators of possibly unanticipated dimensions of a contemplated rule.'" Besler & Co. v. Bradley, 361 N.J. Super. 168, 174 (App. Div. 2003) (citation omitted). Thus, formal

rulemaking leads to a better final product, as it "can assist agencies in furthering the legislative policy goals of the agency's regulatory programs by developing coherent and rational codes of conduct." Id. at 173-74.

The Directive is the kind of agency action that must proceed by formal rulemaking because of its broad, uniform, and prospective determinations and its various new mandates that go beyond existing laws and regulations.

A. The Directive Is the Kind of Executive Agency Action That Requires Compliance with the Rulemaking Provisions of the APA.

More than twenty years ago, the Supreme Court laid out the basic framework for determining when executive agency action requires formal rulemaking. Metromedia, 97 N.J. 313; ; see also N.J.S.A. 52:14B-2(e) (defining a "rule" as "each agency statement of general applicability and continuing effect that implements or interprets law or policy.") The test laid down by Metromedia remains valid today. See Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env'tl. Prot., 191 N.J. 38 (2007) (reaffirming the validity of the Metromedia test and applying it to strike down changes to procedures for applying for historical-status designation).

"[I]nformal agency action" - such as the Directive at issue here - "that is de facto rulemaking will be voided for failing

to comply with the APA rulemaking procedures." Besler, 361 N.J. Super. at 171. Under Metromedia and its progeny, courts must assess the agency action under a six-pronged test to determine whether to require formal rulemaking procedures as opposed to allowing a more informal process. Besler, 361 N.J. Super. at 171-72). The Metromedia test asks whether the agency action:

- (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
- (2) is intended to be applied generally and uniformly to all similarly situated persons;
- (3) is designed to operate only in future cases, that is, prospectively;
- (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
- (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
- (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Metromedia, 97 N.J. at 331-32.

The six factors "must be weighed and not tabulated," Besler, 361 N.J. Super. at 171) (citation omitted), and all "factors need not be given the same weight." Doe v. Poritz, 142 N.J. 1, 97 (1995). However, where "all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process," then formal rulemaking is mandatory. Metromedia, 97 N.J. at 331. Analysis of the

Directive shows that it meets each of the six prongs of the Metromedia test.

1. **Factors 1 and 2: The Directive has wide coverage affecting a large segment of the regulated or general public and applies generally and uniformly to all similarly situated persons.**

There can be little debate that the Directive affects a large segment of the regulated or general public about a crucial right - voting. On its face, the Directive affects the rights of voters to receive information and assistance as well as the rights of those who seek to engage in exit polling or election protection. It is difficult to describe a broader swath of the general public. Recent history shows the disenfranchising of 500,000 to 1.2 million voters during the 2000 presidential election because of problems at the nations' polling places. See Caltech/MIT Voting Technology Project, Voting: What Is, What Could Be, 9, 32-35 (Jul. 2001), available at http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf. Thus, election protection efforts play a vital role in protecting voting rights and documenting election irregularities. Moreover, the proximity of election protection volunteers to voters entering and exiting the polls can be critical to the success of the effort, making a 100-foot clear zone a substantial burden on the affected rights. (See generally Merits Brief of Appellant ACLU-NJ).

In addition, the Directive affects an unknown number of media representatives who, if they wish to perform exit polling, must make a written application to secure and later display special credentials. Moreover, the Directive commands every one of New Jersey's county election boards and election superintendents to take or refrain from taking certain actions including the issuance of permits. It also substantially impacts more than 25,000 members of the district boards of election (i.e., the four or more poll workers present in each of the State's election districts), who must enforce the terms of the Directive. In short, Respondent's Directive affects tens of thousands of New Jersey citizens and election officials on Election Day.

New Jersey courts have treated this prong as satisfied in situations of far less impact. See Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 589 (App. Div. 2000) (holding that restrictions on gun transactions after 8pm and on Sundays "ha[d] a clear effect on the public," thereby fulfilling the first part of the Metromedia analysis); see also N.J. Animal Rts. Alliance v. Dep't of Env'tl. Prot., 396 N.J. Super. 358, 368 (App. Div. 2007) (agency action about black bear hunting plan met the first prong of Metromedia analysis because all potential bear hunters were regulated). Clearly, the Directive affects a much larger segment of the population (voters, civil rights groups, members

of the media, and county and local elections officials) about a very basic and important right, than a regulation curtailing late night and Sunday gun transactions in New Jersey, or hunters who pursue black bears.¹²

In short, since the Directive has widespread effect and will be applied uniformly, it fulfills both the first and second prongs of the Metromedia analysis.

2. Factor 3: The Directive is designed to operate only in future cases, that is, prospectively.

The Directive is indisputably prospective in nature. Respondent's letter of July 18, 2007, issued concurrently with the Directive, states that its provisions "are to be effective commencing with the November 2007 General Election." (7a.) Like the determinations about insurance policies invalidated in In re Disapproval of Commercial Ins. Policy Forms of Ins. Co. of N. Am., 264 N.J. Super. 228, 237 (App. Div. 1993), the Directive

¹² Additionally, the Directive will apply "in a general and uniform way." Mernick v. Div. of Motor Vehicles, 328 N.J. Super. 512, 524 (App. Div. 2000). Although the regulated public falls into distinct categories in relation to certain requirements and/or prohibitions (i.e., members of the media must show credentials in order to conduct exit polling, while non-profit groups must refrain from conducting voter protection activities), the Attorney General's Directive applies uniformly across each regulated category. Thus, all members of the media will be required to produce credentials in the same manner and all voter protection groups will be categorically barred from distributing literature near the polls.

"is prospective in nature. It does not look back, and, in fact, it breaks new ground." Thus, the third prong of Metromedia is satisfied.

3. **Factor 4: The terms of the Directive are not expressly provided by or clearly and obviously inferable from the enabling statutory authorization.**

The Attorney General's prohibition of voter protection and other free speech activities at the polls is "not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization." Metromedia, 97 N.J. at 331. In assessing whether or not an executive regulation falls into this category, New Jersey courts "g[i]ve weight to the similarity of the administrative action in question to an authorizing statute or other authorizing source." Bullet Hole, 335 N.J. Super. at 587.

In Bullet Hole, the State implemented a point-of-contact system, pursuant to the Brady Act, in which firearms dealers would call a telephone hotline administered by New Jersey State Police to screen prospective handgun purchasers. Id. at 569. There, the language of the enabling statute provided little guidance, but the FBI had issued its own guidelines providing for extended hours of operation for hotline screeners. Id. at 569-70. Bullet Hole, a firearms dealer, argued that the State's decision to shorten the hotline's hours of operation required

formal rulemaking under the APA. Id. at 587-90. The court agreed, citing the directive's lack of resemblance to any supporting statutory authority as well as its substantial deviation from the FBI's suggested hours of contact. Id.

Like the operating procedures at issue in Bullet Hole, the Directive here is not inferable from, and indeed is in some ways unrelated to, the relevant statutory authority. The Directive, taken together with the provisions of Title 19 that deal with activity outside polling places (N.J.S.A. 19:34-6, -7, and -15), does not "provide a coherent system" of conduct. Compare Doe v. Poritz, 142 N.J. at 25. The language of Title 19 proscribes obstruction of polling sites and voters, interference with voters, electioneering, loitering, and soliciting within certain areas near the polls. A permitting scheme, like the one in the Directive requiring exit pollsters to apply for and display credentials, cannot be found anywhere in these statutes. Moreover, governmental orders that completely bar the distribution of free, nonpartisan information to voters cannot be fairly inferred from statutes that purport instead to prohibit interference with a voter's access to the polling place and "electioneering," i.e., making a "suggestion or solicit[ing] any support for any candidate, party or public question" at or near the polling place. N.J.S.A. 19:34-15.

Thus, the Directive at issue is not "merely a formalization of . . . requirements explicitly set forth in the statute," see Doe v. Poritz, 142 N.J. at 97-98, but rather a substantial expansion of what the Legislature has prohibited. In Doe, the Legislature instituted registration and community notification requirements for convicted sex offenders. Id. at 14. Plaintiff Doe challenged the Attorney General's guidelines for implementing the community notification law as improper rulemaking. Id. at 95. The Court held that the guidelines did not fulfill the fourth prong of the Metromedia test because they merely codified clear and explicit community notification requirements in the authorizing statute. See id. at 96-98.

In this case, Title 19 is silent regarding election protection activity and exit polling. The statutes do not explicitly or impliedly mention restrictions on conduct that is not electioneering, obstructing, or soliciting voters around polling sites. Because the Directive reaches conduct that is not barred by law, it does not simply implement or codify requirements previously expressed in the statutes.

The responses from interested parties to the September 2006 draft directive provide further evidence that Respondent's interpretation of Title 19 is not supported by the language of the statute. Although the groups differed greatly in their opinions about those proposed guidelines (some groups viewed

them as unduly restrictive, others as too permissive), they generally concurred that the guidelines were at the very least, an aggressive interpretation of Title 19 that went well beyond its letter and spirit.

This kind of vigorous interpretation which diminishes the rights of voters and civil rights groups is not the kind of perfunctory "formalization," id. at 97-98, of statutory requirements that can be excused from rulemaking. Thus, the Directive fulfills element four of the Metromedia test.

4. **Factor 5: The Directive reflects an administrative policy that was not previously expressed or constitutes a material change from a past agency position.**

The Directive implicates the fifth prong of the Metromedia test because the decision to bar voter assistance activities and to regulate exit polling represents an agency policy both new and different from what had existed in the past. University Cottage Club of Princeton New Jersey Corp. v. N.J. Dep't of Env'tl. Prot., 191 N.J. 38, 54-55 (2007).

The Directive is a clear departure from the Attorney General's previously articulated policies concerning the administration of polling sites. While certain aspects of the Attorney General's policies have lacked clarity, their overall trend during past twenty years has been to allow greater free speech activity at the polls.

In 1988, the Attorney General issued an opinion that exit polling should be allowed under Title 19, so long as a case-by-case evaluation confirmed that it would not interfere with voter access or constitute electioneering. (16a.) In August 2006, the Attorney General published a letter indicating that nonpartisan groups could distribute voting rights pamphlets within the 100-foot zone around the polls, to both entering and exiting voters.

The Directive at issue here reverses the State's permissive attitude toward expressive activities by prohibiting most voter protection activities and adopting a novel statewide permitting scheme for exit polling. Furthermore, in its 1988 opinion that Title 19 did not preclude exit polling, the attorney general expressed support for a case-by-case approach when evaluating expressive activities near polling places. (16a.) As long as the activity in question did not constitute electioneering or voter interference, the Attorney General's position was to allow that activity.

The Directive represents a clear departure from this long-standing position. When read together with the interpretive letter, it bars giving materials to any voter, entering or exiting, within the 100-foot zone around poll entrances. (4a, ¶ 11 and 5a.) It also bars any and all "attempts to assist voters within the 100-foot exclusionary zone." (5a.) In sum, it

prohibits activities that were previously allowed, and does so without any individualized inquiry, excluding the possibility of a case-by-case analysis of whether the activities it proscribes constitute electioneering or interference at the polls.

Because the new restrictions on civil rights workers wrought by the Directive are different from past agency positions, the fifth factor of the Metromedia test is satisfied in this case.

5. Factor 6: The Directive reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

The final Metromedia factor also points to formal rulemaking because "the subject matter of the inquiry reaches concerns that transcend those of individual litigants and implicate matters of general administrative policy."

Metromedia, 97 N.J. at 331. Furthermore, "the regulation reflects the agency's own interpretation . . . and expresses a general policy." Mernick, 328 N.J. Super. at 524.

The sixth prong of Metromedia generally disfavors a rulemaking requirement when an agency's implementing directive is "largely dictated either explicitly or implicitly by the language of the statute." Doe, 142 N.J. at 99. Conversely, the sixth prong generally favors a rulemaking requirement when an agency purports to exercise discretion and analysis in the face

of ambiguous implementing legislation. Here, the Attorney General conceded that the issues at stake required a great deal of "deliberation and analysis" (50a), and Respondent took more than five months after the comment period closed to issue the Directive. This is not indicative of a ministerial publication of what is already in the statute, but rather an attempt to divine what the statutory law, tempered by the State and Federal Constitutions, forbids and what it allows. Consequently, under the sixth prong of Metromedia, Respondent should have proceeded with formal rulemaking.

B. The Directive Is Not Exempt From Rulemaking Requirements Under the Intra-Agency Exception.

Finally, because the Directive affects numerous persons not employed by or under the control of the Department of Law and Public Safety, and substantially affects the rights of the public, it is not the kind of "intra-agency" statement that is under some circumstances exempt from the rulemaking requirements of the APA. See Woodland Private Study Group v. State, 109 N.J. 62, 67-75 (1987); N.J. Builders Ass'n v. Dep't of Env'tl. Prot., 306 N.J. Super. 93, 100-02 (App. Div. 1997). The three-prong test for intra-agency directives holds that (1) internal policies and directives by an agency to "agency employees" that (2) do not have a substantial impact on (3) the rights of the public are generally exempt from rulemaking requirements. N.J.

Builders Ass'n, 306 N.J. Super. at 102; see also Woodland, 109 N.J. at 75.

The Directive, however, does not qualify for this exemption because it commands compliance from a variety of persons who are not employees or members of the Department of Law and Public Safety (LPS). Most to the point, the voters affected by the Directive, the nonpartisan groups, and the media representatives are not government employees at all, let alone employees or members of LPS. Even the government actors affected, however, are not under the command of LPS. For example, county boards of election who must issue exit polling permits under the Directive are not part of LPS: they are appointed by political party heads and commissioned by the Governor. N.J.S.A. 19:6-18.

Superintendents of election are appointed by the Governor with the advice and consent of the Senate and are also independent of LPS. N.J.S.A. 19:32-1. District boards of election, who must enforce the Directive, are likewise not employed by LPS: they are appointed by the county boards or the county Assignment Judge. N.J.S.A. 19:6-3. Thus, Respondent's actions do not meet the first prong of the Woodland intra-agency exception.

In addition, Respondent's actions have a substantial impact on the rights of the public or the regulated community. The Directive hampers civil rights groups and media representatives in communicating and gathering information, and interferes with

the rights of the public to receive information, about a very important right: voting. Because the Directive substantially regulates a right of the public, it does not meet the second or third prongs of the Woodland intra-agency exception.

II. RESPONDENT HAS FAILED SUBSTANTIALLY TO COMPLY WITH THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS PRINCIPLES IN ADOPTING THE JULY 2007 DIRECTIVE.

State agencies obligated to engage in rulemaking under the Administrative Procedure Act must follow a series of detailed steps when proposing rules, including public notice to a variety of persons, an analysis of the proposed rule, the solicitation of comments, responses to those comments, and the publication of the final rule in the Administrative Code. N.J.S.A. 52:14B-1 to -25. "No rule . . . is valid," the statute states, "unless adopted in substantial compliance with this act." N.J.S.A. 52:14B-4(d). In New Jersey Animal Rights Alliance, 396 N.J. Super. at 371-72, the court held there was no substantial compliance with the APA and invalidated the agency action where the agency failed to make a presentation of its proposal, publish a summary of the public's comments, respond to the comments, or publish either the proposed or final rule in the New Jersey Register. In contrast, where courts have found substantial compliance, there has been at least publication of the proposed rule in the New Jersey Register and on the

departmental website; "broad[] disseminat[ion]" of the proposal to a "wide variety of interested persons and organizations," and publication of the final rule in the Administrative Code.

Gillespie v. Dep't of Educ., No. A-1120-06T3, 2008 N.J. Super. LEXIS 16, at *16-18 (App. Div. Jan. 17, 2008) (approved for publication).

Here, Respondent did not strictly or even substantially comply with the APA's requirements. There was neither prior published notice of the proposal, nor a summary and analysis of the rule, nor a federal standards analysis, nor legislative involvement, nor clarity in the rule, nor publication of the final rule. The Directive was thus promulgated without regard to any of the formal indicia of rulemaking. In addition, because the final rule was not published, Respondent violated both the APA and due process principles.

A. Advance Notice and Publication of Proposed Rules

Among other things, agencies must give the public advance notice of their proposals. Such proposals must be published in the New Jersey Register and on a "cooperative public computer network," and distributed to the State House press corps.

N.J.S.A. 52:14B-4(a)(1).

There is no dispute that Respondent did not publish the August 31, 2006, determination, which granted broad rights to

exit pollsters and civil rights workers, the October 24, 2006, revocation of that determination, or the requests for comment that attended both of those rulings. On the contrary, these documents were circulated only to select persons (county boards of election, county superintendents of election, the Public Advocate, and a few voting rights groups and think tanks). (46a-57a.) For reasons that are not apparent in the record, several groups that have been extremely involved in election protection efforts such as the NAACP, the League of Women Voters, and People for The American Way Foundation (see supra n.3 and materials cited therein) were not given copies of the proposal or an opportunity to comment.

By not publishing either of these proposals in the New Jersey Register as required by law, the Attorney General deprived wide segments of the regulated community and the voting public of notice and an opportunity to comment on them. Moreover, there is no evidence in the record that these proposals were even disseminated on the Division of Elections' Internet site or some publication other than the New Jersey Register.

Especially disturbing is the absence of evidence that media representatives were put on notice of the Attorney General's proposal as required by N.J.S.A. 52:14B-4(a)(1). Although the proposed Directive substantially affected the rights of media

organizations by establishing a permitting scheme and new rules for exit pollsters, the Attorney General did not provide the statehouse press corps with notice of these new rules as required by the APA, nor did the Attorney General provide them to national exit poll consortiums.

B. Summary of Rule and Impact Statement.

An agency proposing a rule must prepare and publish, along with the proposed rules, a "summary of the proposed rule, the specific legal authority under which its adoption is authorized, a description of the expected socio-economic impact of the rule, a regulatory flexibility analysis [or a statement that one is not required], [and] a jobs impact statement. . . ." N.J.S.A. 52:14B-4(a)(2); see also N.J.S.A. 52:14B-18, -19, and -21.

Here, the proposed directive was unaccompanied by any of these statutory requirements. For example, the October 24, 2006, determination and solicitation for comments is bereft of even a single citation to statutory authority for the proposal. Even the draft directive of September 13, 2006, omits any specific statutory references. Neither contains a summary of the rule, nor is there any expression by Respondent about awareness of the impact of the proposal on civil rights workers or the public at large.

C. Federal Standards Analysis

As a general matter, State agencies must also examine the interplay between their proposed regulations and federal law about the same subject matter. N.J.S.A. 52:14B-22 and 23. Here, the draft directive was devoid of such an analysis. This is despite the severe constraints federal law imposes on the ability of government to regulate nondisruptive speech at the polls. (See generally Merits Brief of Appellant ACLU-NJ). Moreover, federal law affirmatively protects the rights of people who are "aiding [another] person to vote or attempt to vote." 42 U.S.C. § 1973i(b); Johnson v. Mississippi, 421 U.S. 213, 236 (1975) (Marshall, J., dissenting) (§ 1973i(b) "protect[s] those urging others to exercise their rights to vote"). The proposed directive contained no discussion or argument as to why the new rules and permitting scheme would not conflict with federal law or impose standards more restrictive than those allowed by federal law.

D. Transmission of Rule to Legislature

In light of the Legislature's constitutional power to review and abrogate executive agency regulations, N.J. Const. art. V, § IV, ¶ 6, the APA further mandates that rule proposals must be transmitted to the Legislature's leadership and relevant committees for review. N.J.S.A. 52:14B-4.1, -4.3. There is no

evidence that this occurred here. Thus the Legislature had no opportunity to assess whether the draft directive comported with Title 19. Yet, expressions of concern from at least two legislators about the propriety of the proposed directive demonstrate at least some level of interest in the process. (Ra49, 53.) This interest should have been satisfied by the statutorily required transmission to the Legislature.

E. Standard of Clarity

Under the APA, proposed rules cannot go forward unless they meet a "standard of clarity." N.J.S.A. 52:14B-4.1a(b). Specifically, rules must be "written in a reasonably simple and understandable manner which is easily readable." Id. "Terms of art and words with multiple meanings that may be misinterpreted [must be] defined." Id. The public must "understand accurately and plainly the legal authority, purposes, and expected consequences" of the rule. Id. Likewise, the Office of Administrative Law (OAL) must also determine whether the proposal "permit[s] the public to understand accurately and plainly" the basis for the rule and what is expected of them under the rule. Id. The APA expressly requires allows the OAL to reject rules that do not meet this standard of clarity. Id.

As described above, both civil rights groups and election officials viewed the Directive as ambiguous because it failed to

define terms such as "exit polling," "entry polling," and "nonpartisan." These ambiguities are not resolved within the four corners of the Directive, and the two interpretive letters discussed above only added to the confusion by, in some cases, contradicting the express terms of the Directive. See Statement of Facts, § G (discussing how the interpretive letter bans all voter assistance and pamphleteering but the Directive only bars it as to entering voters). The Directive also lacked deadlines for county election officials to supply exit pollster credentials. (Id.)

Had the Directive proceeded in accordance with formal rulemaking procedures, OAL could have intercepted these ambiguities before a final rule was adopted. Because it was not, election officials, civil rights groups, and the public are left with a Directive with substantial ambiguities and insufficient guidance as to how to conform their conduct. This provides an additional reason for voiding the agency action. In re Playboy-Elsinore Assocs., 203 N.J. Super. 470, 476-477 (App. Div. 1985) (agency procedures that are "too vague to enforce . . . must be invalidated").

F. Publication of Final Rule in Administrative Code

Finally, to give the public the required notice of what conduct is expected upon rule adoption, agencies must publish

the final rule in the New Jersey Administrative Code. N.J.S.A. 52:14B-5 and -7. The Administrative Code, in turn, must be widely distributed to the government and the public. N.J.S.A. 52:14B-7. The publication requirement gives the public at large notice of what rules it must follow.

The requirement that rules or laws be published for all to see and understand is not just a requirement of the APA: its origins are in the Constitution. As the Supreme Court explained in Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Yet, Respondent's decision to proceed by an unpublished Directive and at least two interpretive letters that alter the terms of the Directive means that persons wishing to conform their conduct will not have fair notice of what is allowed, what is prohibited, and what permits need to be obtained. Courts have routinely invalidated published laws under the State and Federal Constitutions where they were void for vagueness. See, e.g., State v. Cameron, 100 N.J. 586, 591 (1985). A vague and unpublished directive offends due process twice: first by its inscrutability and again by its inaccessibility.

Commenting on New Jersey's abolition of common-law crimes that were never codified into statutory law, the Law Division

has applied the principle that laws must be published before people can be punished for violating them. See State v. Palendrano, 120 N.J. Super. 336, 343-44 (Law Div. 1972). There, the trial court observed that it would be unfair to require "the average citizen . . . to carry a pocket edition of Blackstone" to know what conduct could be punished at common law. Id. at 344. So, too, here. It would be similarly unfair to require an average citizen volunteering her time to promote free and fair elections to scour the State's records for unpublished directives regulating civil rights workers to know what conduct is expected of her. Respondent's failure to publish the final Directive in the Administrative Code or some other generally accessible law book renders it unenforceable under both the APA and due process principles.

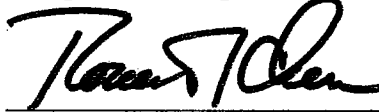
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Under the totality of the circumstances, therefore, there was no substantial compliance with the APA's requirements for advance public notice of the proposed directive, a summary of the rule and an impact statement, a federal standards analysis, the formal transmission of the proposal to the Legislature, clarity, and publication of the final rule. Therefore, the Directive is invalid.

CONCLUSION

For the foregoing reasons, the Attorney General's July 18, 2007, Directive on Exit Polling, and any interpretive letters issued thereunder, should be invalidated.

Respectfully submitted,



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Dated: January 22, 2008

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Diane Carman, Organizations Mobilize Amid Fears
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Caren Burmeister, Beaches Voters Go Strong for
 Bush, Florida Times-Union (Jacksonville),
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Yawu Miller, Students Monitor Hub Polling Places,
 Bay State Banner (Massachusetts), Vol. 40.,
 No. 13 (Nov. 11, 2004)DPA7a

Carol Biliczky, Protection for Election; National
 Group Offers Legal Aid in Case Voters are
 Turned Away From Polls Nov. 2, Akron Beacon
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Jerome L. Sherman, Volunteers Monitoring Polling
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Voting Rights Coalition Implements New Jersey
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 Italian Voice, Vol. 74, No. 18 (2005).....DPA13a

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Copyright 2004 Institute for Public Affairs
In These Times

November 15, 2004

SECTION: FRONTLINE; Pg. 10**LENGTH:** 867 words**HEADLINE:** Making Every Vote Count**BYLINE:** By Phoebe Connelly**BODY:**

This year's presidential election has spurred massive registration drives. States are hiring extra help to process applications and to implement new procedures required under the Help America Vote Act (HAVA), passed by Congress in 2002. But will these new voters have their day at the polls?

States were required to comply with two HAVA mandates by January 2004: provisional balloting and ID requirements for first-time voters registered by mail. However, reports by the Election Reform Information Project and the National Conference of State Legislatures show that implementation was slow in coming, leaving poll workers throughout the United States woefully under-trained to deal with the changes.

Add ongoing patterns of Republican secretaries of state disenfranchising voters to this mix, and you have a recipe for Election Day chaos.

While election irregularities in Florida received the lion's share of attention in 2000, voting problems, often concentrated in minority communities, plagued many states. In Chicago, for instance, 7 percent of votes cast went uncounted due to ballot errors, and in minority precincts the percentage was as high as 17 percent. In the 2004 South Dakota primary, a different HAVA-induced problem surfaced: Native Americans were prevented from voting after they failed to provide photo IDs, a requirement not mandated by state or federal law.

Irregularities that result in spoiled ballots will mean everything in this close presidential race. Voters and poll workers need guidance on November 2, and several groups are gearing up to provide it.

Educating voters

The following groups are making voting rights information accessible to voters before they get to the polls.

* **ACLU** (www.aclu.org/vote): The ACLU Voting Rights Project has produced voter empowerment cards for 12 states and will add other states up until the election. It also provides regular updates about efforts to protect the votes of minorities and ex-felons.

* **PROJECT VOTE SMART** (www.vote-smart.org): Project Vote Smart's site provides links and contact information for all the states' boards of election, as well as voter registration requirements.

* **LEAGUE OF WOMEN VOTERS** (www.lwv.org): The League has long been respected for its nonpartisan voter guides. During this election, the League also produced a brochure, *5 Things You Need to Know on Election Day*.

* **ELECTION REFORM INFORMATION PROJECT** (<http://www.electionline.org>): This project of the University of Richmond and The Pew Charitable Trusts administers [electionline.org](http://www.electionline.org), a nonpartisan Web site that analyzes and reports on election reform efforts. The site provides breaking news about election reforms around the country and a state-by-state breakdown of HAVA implementation.

Observing the polls

DPA 1a

Making Every Vote Count In These Times November 15, 2004

The following groups are organizing and deploying teams of poll monitors (also called poll watchers) to observe the election. For the first time international organizations will participate in these efforts.

* **ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE** (www.osce.org): The OSCE is a 55-nation regional security organization that encourages member nations to monitor each other's elections, and has sent delegations to observe elections in Britain and France. The OSCE will send a delegation of 75 observers to monitor the U.S. presidential election in response to requests for international observation by a group of congressional leaders headed by Rep. Eddie Bernice Johnson (D-Texas). "We owe our efforts to improve upon our democracy not only to Americans but also to the rest of the world," Johnson says. "The world looks to the United States as a role model for freedom and justice."

* **GLOBAL EXCHANGE** (www.fairelection.us): Global Exchange, an international human rights organization based in San Francisco, is sponsoring Fair Election: International Election Observation 2004. The effort began September 14, when a 20-member delegation -- including Horacio Boneo, an Argentine professor who is one of the United Nations' top advisors on elections, and Brigalia Bam, who chairs South Africa's Independent Electoral Commission -- visited the United States to examine the state of voting procedures. During election week, an eight-person delegation will visit polling sites and conduct interviews with voters.

* **ELECTION PROTECTION** (www.electionprotection2004.org): A coalition of groups led by People for the American Way, Election Protection 2004 is training and deploying 25,000 poll monitors throughout the United States. They are distributing "Voters' Bills of Rights" and staffing a toll-free number 866-OUR-VOTE (866-687-8683) to answer registration and voting questions. Monitoring is focused in states where minority communities have been disproportionately disenfranchised in the past.

"What you're really talking about is credibility and acceptability," said Terence Humphreys, an election observer with Global Exchange. "What appears to have happened is that the 2000 elections were not acceptable to a large number of U.S. citizens. . . observation is one way to help make them more credible."

GRAPHIC: Illustration, no caption

LOAD-DATE: November 3, 2004

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Copyright 2004 The Denver Post
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The Denver Post

July 15, 2004 Thursday
FINAL EDITION

SECTION: DENVER & THE WEST; Pg. B-05

LENGTH: 650 words

HEADLINE: Organizations mobilize amid fears of voting fraud

BYLINE: Diane Carman Denver Post Staff Columnist

BODY:

Along with endless polls, campaign swings by presidential candidates and a lot of insulting political ads, our status as a potential swing state could bring something else to Colorado this election year: voting fraud.

For some hot-blooded partisans, the urge to manipulate elections can be irresistible. And the mess in Florida in 2000 provided all sorts of cynical ideas.

So an array of nonpartisan democratic-action organizations are mobilizing to inform voters of their rights, monitor polling places and attempt to protect the integrity of the election process in a year when the decision could come down to a handful of votes.

One of the organizations, the Election Protection Program of the People for the American Way Foundation, has targeted Colorado.

"Colorado's status as a purple state means there will be a ton of voter registration projects," said Priscilla Ring, spokeswoman for the program. "And new voters don't necessarily know where or how to vote."

They're easily discouraged. They go home if they're in line when the polls close. They misread ballots or believe people who suggest they're not qualified to vote.

This year, problems already have emerged.

In Texas at historically black Prairie View A&M University, the district attorney was accused of trying to disenfranchise voters by saying that college students were not permanent residents and therefore not eligible to vote. But when the NAACP and several other organizations filed suit, Texas Secretary of State Geoffrey Connor intervened, saying the DA was wrong. He called the effect of the DA's actions on new voters "chilling."

Meanwhile, in Florida, controversy has erupted once again over the effort to purge voter registration lists of the names of convicted felons (who are not eligible to vote in that state). Because of what Gov. Jeb Bush called a "mistake," most Hispanic felons remained eligible to vote, while the names of black felons were purged. Since the Cuban-American community is a solidly Republican voting bloc, the move drew charges of fraud from Florida Democrats.

Here in Colorado, Evelyn Rojo said the biggest problem could be the new federal requirement that voters provide specific forms of identification at polling places. "There are many misunderstandings about that," said Rojo, the state coordinator for the Election Protection Program.

And, she said, the process for provisional voting is even more confusing.

"The main thing is we want to have a copy of the Voters' Bill of Rights in people's hands when they enter the polling place," she said, referring to a pamphlet put out by her group. "They need to know their rights."

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Copyright 2004 The Florida Times-Union
Florida Times-Union (Jacksonville)

November 6, 2004 Saturday
Community Edition

SECTION: SHORELINES; Pg. L-1

LENGTH: 820 words

HEADLINE: Beaches voters go strong for Bush;
Turnout not quite as high as county's 74% overall

BYLINE: Caren Burmeister and Christophe Aguilar, Shorelines staff writer

BODY:

Beaches voters chose President Bush this week by about the same margin they did four years ago, showing a more conservative bent than Jacksonville as a whole.

About 66 percent of Beaches residents voted for Bush compared with 34 percent for Kerry, according to the Duval County Supervisor of Elections Office. Throughout the county, about 58 percent of voters supported Bush.

A majority of Beaches voters in all 15 precincts supported the president. Precinct 13B, at Lighthouse Christian Center in Jacksonville Beach, voted most heavily for the president, with 1,046 voting for him and 303 for Kerry. The vote was the closest at Precinct 13S, Oceanside Church of Christ in Atlantic Beach, where Bush got 657 votes and Kerry got 573.

Beaches poll workers said they found lines of voters, sometimes 200 people deep, when they opened the precinct doors at 7 a.m. Tuesday. Some of the early voters had to wait 40 minutes to cast their ballots.

No voting snafus were reported at the Beaches, said Elections Office spokeswoman Erin Moody.

However, elections records show that Beaches voter turnout was lower than Jacksonville's. The turnout ranged from about 67 percent at the Lighthouse precinct to 48 percent at Oceanside. Countywide, voter turnout was about 74 percent.

In 2000, about 71 percent of Beaches residents voted in the presidential race, supporting Bush 64 to 36 percent.

There is some confusion about the exact number of registered voters at the Beaches. As of Oct. 19, the Elections Office showed 15,086. By Election Day, that figure hadn't been updated to add people who registered at the last minute. A count of ballots cast in Tuesday's presidential race showed 17,519 Beaches voters.

One of them was Rebecca Young of Jacksonville Beach, who, at age 20, was voting for the first time for president. She chose Bush, noting she didn't like Kerry's view on the war in Iraq.

Young said she also voted for Lee Buck, who won a Jacksonville Beach City-Council race against Don Stratmann, because he was the only candidate who knocked on her door and asked for her vote. Young also voted for Amendment 1, which called for a citywide 35-foot building height cap in her city.

"I love our beach. I love the way it is and I love the way it looks," Young said.

Poll greeter Jim Hurley, working at the Neptune Beach Senior Activity Center, said that since Duval County is heavily Republican, some Democrats felt intimidated about picking up the sample ballots because they didn't want their neighbors to know their political affiliation.

"If they take a ballot or information from me, they do it quietly," Hurley said.

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Beaches voters go strong for Bush; Turnout not quite as high as county's 74% overall Florida Times-Union (Jacksonville)
November 6, 2004 Saturday

Neptune Beach resident Kerry Bloch said the voting process went smoothly for her but it was strange how they checked each voter's information and address.

"They were making double sure you are who you are," she said.

Meanwhile, Neptune Beach resident Danielle Shepherd was surprised at how quickly she was able to vote since she was expecting long lines.

She said the only problem she encountered while voting was that one candidate's name was misspelled and the precinct staff was notifying all voters of the error before they cast their vote.

At Christ United Methodist Church on Penman Road, precinct clerk Richard Ouellette said they had a long line of voters waiting to vote before they opened the precinct.

"They started coming at 6 a.m. and it was busy until 10 a.m.," he said.

Ouellette said two U.S. Justice Department officials came to inspect the precinct's operations and left satisfied with the results of the inquiry.

Meanwhile, Atlantic Beach resident Alberto Escamilla worked as a poll watcher for the Democratic Party at the Oceanside Church of Christ precinct west of Mayport Road. The church has a large minority voting population.

Escamilla said several people who came to vote needed to make change of address updates, but poll workers allowed them to cast provisional ballots.

"No one has been turned away," he said.

Donald Sherwood, a poll worker at the church, said this was the busiest election he had worked in his six years. In many cases, people left before voting and returned in the afternoon when the crowds had subsided, he said.

Outside the church, Ron and Lindy Johnson wore the signature black T-shirts given to national Election Protection volunteers. The Chattanooga, Tenn. couple had volunteered to be poll monitors for the non-partisan organization.

They handed out information and leaflets with the Florida voter Bill of Rights. They also had a cell phone ready to call lawyers for the organization in case there were any problems.

The couple said there were no voting problems at the precinct.

Staff writer Caren Burmeister can be reached at (904) 249-4947, extension 21, or via e-mail at caren.burmeister@jacksonville.com.

BEACHES VOTING FOR PRESIDENT

Bush -- 11,643; 66 percent

Kerry -- 5,876; 34 percent

DUVAL COUNTY VOTING FOR PRESIDENT

Bush -- 218,476; 58 percent

Kerry -- 157,624; 42 percent

GRAPHIC: Photo

Photo: bbb_03galleryelex110304.jp Maggie FitzRoy/staff Leslie Seward waves to people driving by as she stands on Florida A1A in Ponte Vedra Beach on Election Day, doing some last-minute campaigning for President Bush.

Photo: bbb_06GalleryElex110304 bbb_0 Gary Wilcox/staff Richard Riley holds a sign saying "Sharp for Mayor of Jacksonville Beach," while Susie White wants "No More Highrises," referring to the citizen-sponsored measure to limit the height of new construction to 35 feet.

LOAD-DATE: November 10, 2004

DPA 6a

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Ethnic NewsWatch
Bay State Banner

November 11, 2004

SECTION: Vol. 40; No. 13; Pg. 9

SLI-ACC-NO: 0105BSLS 077 000020

LENGTH: 721 words

HEADLINE: Students monitor Hub polling places

BYLINE: Miller, Yawu

BODY:

Ashlee Waller has never voted, but she knows a thing or two about the voting rights she expects to have when she turns 18.

While many other high school students were pondering important dates in US history, Waller and several classmates from the Mission Hill School spent last Tuesday morning monitoring polling stations to make sure voters' rights were being respected.

Armed with copies of a "voter's bill of rights" which they handed out in front of the polling stations, the students say they witnessed a wide range of violations of voters rights.

Waller said at the Kennedy School the wait was the single most vexing problem for voters. Because the school serves voters from two different precincts, poll workers set up two different lines for voters, each of which stretched out of the school's doors. But the poll workers failed to mark which line was for which precinct, leading many voters to waste time in the wrong line.

"It shouldn't be so hard for people to vote," Waller said. "if their name's on the list, they should be able to vote."

Waller and her classmates were among the 400 volunteers mustered by MassVOTE state-wide in an effort to monitor and record polling irregularities.

"We had heard there were multiple problems in the past," said MassVOTE Executive Director Juan Martinez. "We wanted to quantify these experiences people were having at the polls."

Martinez says his organization is inputting data gleaned from the volunteers and will produce a report by January, when MassVOTE will release its electoral reform agenda. The reforms MassVOTE will advocate for in 2005 will likely include measures such as election day registration, a move that would eliminate the two week waiting period for voter registration.

Whether or not lawmakers in Massachusetts approve the changes MassVOTE advocates for, Martinez says the state could do better in making sure the

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current laws are enforced. Not only are many voters ignorant of the laws that protect their right to vote, so too are many of the poll workers, according to Martinez, who wants the state to train the workers.

Gloria Alvarez, who monitored the polling station at Roxbury's Lewis School, said she saw a woman who said she had recently registered to vote turned away from the polling station.

"They said her name was not on the list," Alvarez said. "They didn't even give her a provisional ballot. They just told her she couldn't vote. I told her she could still vote with a provisional ballot. But when she went back in, they didn't have any."

The poll workers, reminded of the law by the students, eventually produced a regular ballot and wrote "provisional" at the top.

Other irregularities included an apparent absence of paper sleeves to cover ballots before they are entered into scanning machines. One poll worker hovered over voters as they marked their ballots, according to student Robert Baez.

"She kept bringing people to the stalls where they marked their ballots," he said. "She would stay there and stand right behind them. That's not privacy to me."

Voters at a Columbia Road polling station were all asked to produce identification, whether or not their names were on the voting list, according to Judelsy Gonzalez.

"They were asking every single voter for ID," she said. "The law says you're not supposed to do that."

Other complaints the students heard included a lack of translation services and rude poll workers.

"The people helping out need to be patient," Waller said. "If you're there to help people vote, you should help them."

Martinez said poll workers are required to work a 13-hour shift -- a requirement that makes it difficult for many people to sign up for the job. One reform Martinez said MassVOTE may try to pursue would be splitting shifts.

"If you split it up into two six-and-a-half-hour shifts, your pool of workers could be a lot broader," he said.

Martinez also said the city should hire more bilingual workers and allow non-citizens to serve.

Baez suggested that signs outlining voters' rights be posted prominently in voting places so that both poll workers and voters would be able to see them. Article copyright The Bay State Banner.

GRAPHIC: Photograph, Students from the Mission Hill School

JOURNAL-CODE: BS

LOAD-DATE: January 3, 2005

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Akron Beacon Journal (Ohio)

October 14, 2004 Thursday 1 STAR EDITION

SECTION: METRO; Pg. A14

LENGTH: 499 words

HEADLINE: PROTECTION FOR ELECTION;
NATIONAL GROUP OFFERS LEGAL AID IN CASE VOTERS ARE TURNED AWAY FROM POLLS NOV. 2

BYLINE: Carol Biliczky, Beacon Journal staff writer

BODY:

If you get turned away from a polling place Nov. 2, there may be help close at hand.

A nationwide movement called the Election Protection Coalition will have poll watchers and legal help in Akron to ensure that everyone votes who's entitled to.

"We want to be sure that we don't have anything remotely like Florida happening here," said coalition volunteer Gail McWilliams, president of the Akron Area Chapter of the National Organization for Women.

The Washington, D.C.-based coalition is made up of more than 100 organizations -- from the People for the American Way Foundation to the NAACP and the Lawyers Committee for Civil Rights Under Law.

The coalition is recruiting 25,000 volunteers across the country to serve as nonpartisan poll watchers and provide legal advice at 3,500 precincts in 17 states, including Ohio.

The coalition aims to have monitors in precincts with heavy minority populations in seven Ohio cities. In addition to Akron, the urban areas of Columbus, Cincinnati, Toledo, Youngstown, Cleveland and Dayton are thought to be where voters are most likely to be disenfranchised.

Monitors will stand outside precincts and distribute state-specific voter's bills of rights, offering to help voters who are turned away or blocked from voting and keeping track of problems that crop up.

Monitors can go further if issues can't be resolved on site, contacting coalition attorneys or law student volunteers through a special hot line or intervening directly with boards of elections.

"On Nov. 3, we want to be sure we did everything we could," said Jocelyn Travis, the Election Protection coordinator for Ohio.

In many cases, potential voters are disenfranchised because they get bad advice, said Travis and Tina Merlitti of the League of Women Voters of Summit County, who addressed a training group of 20 Akron volunteers Wednesday.

For instance, ex-convicts often think they can't vote, but they can. So can the homeless. And everyone can vote provisionally if they've registered, even if their name by some fluke doesn't appear in the official poll books.

Other tips: Voters don't have to show identification to vote, although having it on hand may stem problems. Voters can request as many as three ballots if they make a mistake on the one they're given. And they have the right to stand there and watch the Board of Elections worker slide their ballot into the box, although they won't necessarily be able to do it themselves.

Some volunteers in low-risk areas will be shunted to precincts in other cities that are considered to be at high risk for disenfranchising voters. All volunteers will work in shifts to ease the burden.

DPA 9a

PROTECTION FOR ELECTION; NATIONAL GROUP OFFERS LEGAL AID IN CASE VOTERS ARE TURNED AWAY FROM POLLS NOV. 2 Akron Beacon Journal (Ohio) October 14, 2004 Thursday 1 STAR EDITION

Volunteer training is going on now statewide. A second session for Akron is being set up, Travis said. Refresher training sessions will be held on Nov. 1.

For details about Election Protection, visit www.electionprotection2004.org (no hyphen) on the Web or call the toll-free hot line at 1-866-OUR-VOTE.

NOTES: Election 2004: Carol Biliczky can be reached at 330-996-3729 or cbiliczky@thebeaconjournal.com

LOAD-DATE: September 1, 2005

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Pittsburgh Post-Gazette (Pennsylvania)

November 2, 2004 Tuesday SOONER EDITION

SECTION: LOCAL, Pg.A-7**LENGTH:** 553 words**HEADLINE:** VOLUNTEERS MONITORING POLLING PLACES;
NONPROFIT GROUP PROTECTS EACH INDIVIDUAL'S RIGHT TO VOTE**BYLINE:** Jerome L. Sherman, Pittsburgh Post-Gazette**BODY:**

When Pat O'Malley goes to the polls today, she'll be wearing a black smock emblazoned with bold, white letters that dictate a simple statement: You Have The Right To Vote.

She's one of about 300 volunteers in the Pittsburgh region with Election Protection, a nonpartisan group that hopes to help people address problems at polling sites, while serving as a deterrent to anyone who tries to intimidate voters and keep them from casting ballots.

Election Protection was created in the wake of the Florida recount mess following the 2000 presidential election, and organizers estimate that they'll deploy as many as 25,000 poll monitors across the country today.

"When people were refused the right to vote in Florida, that angered me," said O'Malley, 50, of Brentwood. "That's not right with me, regardless of who you vote for."

Last night, O'Malley, a consultant for nonprofit organizations, attended an information session at the Friends Meetinghouse in Shadyside, where she and other volunteers were briefed by David Schlitz, a Washington, D.C.-based lawyer helping Election Protection prepare potential legal challenges.

"You are the linchpin in this effort," Schlitz told the diverse group of about 50 people. "You are the eyes and ears. If you don't see something, we can't be of any help."

A team of lawyers volunteering their time will be based at the Downtown headquarters of the Eckert-Seamans law firm, fielding calls from volunteers who spot problems at the more than 60 polling sites they'll be monitoring, including spots in Oakland, the Hill District, Garfield, East Liberty, Homewood and Beltzhoover.

Some lawyers will be stationed at sites around Pittsburgh and will be ready to head to trouble areas on a moment's notice, Schlitz said.

Before going to a polling place, each volunteer will pick up a packet that includes a list of contact numbers, a camera, a cell phone and a stack of Voters' Bill of Rights to be distributed to every voter.

The monitors will also get stacks of "irregularity" forms for voters who think they were mistreated and "warning" sheets that say harassment of people at a polling place is a violation of federal and state law. Schlitz told volunteers they can give the warnings to anyone acting suspiciously after first checking in with Election Protection headquarters.

They can also use cameras to document anyone trying to intimidate voters.

"In the vast majority of cases, that should be enough," he said. "They're going to leave."

Mostly, however, Schlitz said the volunteers should expect to see routine problems, such as voters who show up at the wrong polling sites and don't know where to go.

In such cases, Election Protection has a toll-free number, 1-866-687-8683, that volunteers or voters can call.

DPA11a

**VOLUNTEERS MONITORING POLLING PLACES;NONPROFIT GROUP PROTECTS EACH INDIVIDUAL'S
RIGHT TO VOTE** Pittsburgh Post-Gazette (Pennsylvania) November 2, 2004 Tuesday

Schlitz also said polling places may run low on provisional ballots, which election officials are supposed to give to voters who are not on registration lists or first-time voters who do not have proper identification.

But if all goes well, the poll monitors may not have much to do at all.

"I expect to be standing around all day doing nothing except handing out fliers," said Nick Petronik, 27, a graduate student at Carnegie Mellon University. "But I think it's worth it in case something does happen."

NOTES:

Jerome L. Sherman can be reached at jsherman@post-gazette.com or 412-263-1183.

GRAPHIC: PHOTO: John Heller/Post-Gazette: Scilla Wahrhaftig, left, an assistant project manager, directs volunteers toward Election Protection training last night at the Friends Meetinghouse in Shadyside.

PG Photo/John Heller 11/01/04

LOAD-DATE: November 2, 2004

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October 27, 2005 Thursday

SECTION: Pg. 1 Vol. 74 No. 18

ACC-NO: 58601

LENGTH: 1095 words

HEADLINE: Voting Rights Coalition Implements New Jersey Election Protection 2005 Project

BODY:

ABSTRACT

The 2005 New Jersey Election Protection Project is a non-partisan effort to determine the extent of voting problems in New Jersey and the effect of state reforms on resolving these problems as reforms are implemented. Poll Monitors wearing visible yellow vests will be located in those polling places which saw many problems in the 2004 general elections, including Camden, Edison, Newark, Jersey City, Palisades Park, and New Brunswick. The Monitors will survey voters exiting the polls about their experiences with provisional ballots, language assistance, challenges, and the manner in which poll workers handled any problems. Monitors will also be able to offer citizens with voting problems immediate access to support lawyers by phone or onsite if necessary. McCarter & English of Newark have established a central base at their offices for the November 8th effort, staffed with lawyers to handle the incoming calls.

The Coalition will analyze the survey data from the Project for changes in voting problems compared with past years in order to facilitate future advocacy efforts targeted at improving the administration of elections in New Jersey. The Project will now also probe whether the state response to a GOP demand for a "crackdown on voter fraud" affects the number of eligible voters left off the rolls. Executive director of NJ Appleseed Renee Steinhagen commented, "Purging eligible citizens from rolls has been a problem around the country. We want to ensure that eligible voters aren't wrongfully purged from the rolls in New Jersey."

FULL TEXT

The American Civil Liberties Union of New Jersey, the New Jersey Apple-seed Public Interest Law Center, the Asian American Legal Defense and Education Fund, the Advancement Project, People for the American Way and the Lawyers Committee for Civil Rights Under Law announce the establishment of the New Jersey Election Protection 2005 Project for this November's gubernatorial election.

The New Jersey Citizens' Coalition on HAVA Implementation has been working on the State's implementation of the federal Help America Vote Act, which was passed in response to the problematic 2000 presidential election. Coalition members collaborating on Election Protection 2004 in New Jersey also found numerous voting problems, including but not limited to:

- * incomplete voter rolls.
- * improper demand for additional documents from people with prior convictions trying to register to vote.
- * denial of language assistance to those voters who require it.
- * denial of provisional ballots to citizens whose names were missing from the rolls.
- * confusion about the correct poll site for voters.

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Voting Rights Coalition Implements New Jersey Election Protection 2005 Project Italian Voice October 27, 2005
Thursday

- * improper demands for identification at polls.
- * poll worker unfamiliarity with election law, procedures, and new electronic machines.

These ongoing problems prevented many citizens from exercising their right to vote in past elections.

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Donita Judge of the Advancement Project points out that determining how many provisional ballots are used and then counted as votes will be an important aspect of this analysis. Her analysis of the 2004 election showed that Bergen, Essex, Hudson, and Middlesex had the highest number of uncounted provisional ballots. Judge adds, "The new state law permitting all voters to cast absentee ballots without stating a reason will need careful monitoring to guarantee that voters are not disenfranchised due to misdelivered or undelivered absentee ballots".

Glenn D. Magpantay, staff attorney at the Asian American Legal Defense and Education Fund, critiqued poll workers' performance of their responsibilities in a detailed letter to the Attorney General after the 2004 general elections. "Several poll workers violated federal law by preventing voters from having assistance inside the voting booth [from persons of their choice] Poll workers must be better trained in voters' rights to [language] assistance." He hopes the new law mandating uniform poll worker training will alleviate prior problems, as well as state-mandated conspicuous postings of Voters' Bill of Rights in languages that are spoken by 10% or more of the registered voters in the district.

Coalition members urge any New Jersey an encountering problems with voter registration or voting to call the 1866-OUR-VOTE toll free hotline. This service, which is an integral part of the National Election Protection effort, allows voters to obtain immediate assistance from volunteers trained in New Jersey election law.

The Coalition will continue to press for improvements in the statewide voter data base to protect voters from exclusion due to administrative errors, regulations to ensure that current laws regarding the enfranchisement of felons are complied with by all counties, and other legislation. They seek to (i) enable provisional ballots to be counted as valid across county lines, (ii) revamp the machine certification process, and (iii) establish an audit system to ensure that paper records are consistent with machine tallies.

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LOAD-DATE: August 16, 2007

DPA 14a

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The Associated Press State & Local Wire

November 1, 2004, Monday, BC cycle

SECTION: Political News

LENGTH: 561 words

HEADLINE: Some election watchers won't get a view as close as they'd like

BYLINE: By GEOFF MULVIHILL, Associated Press Writer

DATELINE: MOUNT LAUREL, N.J.

BODY:

The nonpartisan election observers being dispatched across New Jersey on Tuesday to make sure voting rights are upheld will not be allowed inside polling places.

Some of those groups and some county election officials have said that the state Attorney General has decided the monitoring groups must stay 100 feet from the polling places. That's the same distance partisan campaigners must stand from polls.

In past years, monitors have been allowed closer to the polls and in some cases have stood right outside polling place doors.

"We are not permitting anyone in our polls," Sharon Seman, an administrator at the Camden County Board of Elections, said Monday. "It creates too much confusion."

While the 100-foot rule is written into law, some of the nonpartisan groups say enforcement has been erratic in the past. And in some cases, they said, the distance may hinder their work. The Attorney General's Office did not immediately return a call about the distance the monitors will have to stay from the polls.

Those who will be allowed into polling places include election challengers designated by candidates and political parties. They usually sit behind poll workers and part of their function is to request poll workers ask voters to prove they're eligible to cast ballots.

In some parts of the country, challengers are not frequently used and their anticipated presence this year is being criticized for potentially intimidating voters. But in New Jersey, the number of challengers does not appear to be much higher this year than in other presidential elections.

Still, it's fears of irregularities - perhaps caused by the challengers - that has led to increased interest from voting-rights groups.

The monitoring groups expected to dispatch lawyers and law students to polling places in New Jersey on Tuesday include the NAACP Legal Defense Fund, the Asian American Legal Defense and Education Fund and at least one law school.

The groups were planning to focus their work in heavily minority areas, mostly in cities such as Newark, Jersey City, New Brunswick and Camden.

While there have been some of these self-appointed monitoring groups in the past, their efforts have become more intense since the 2000 presidential election, which was decided by just a few hundred votes in Florida.

DPA 15a

Some election watchers won't get a view as close as they'd like The Associated Press State & Local Wire November 1,
2004, Monday, BC cycle

Most of the voters' rights efforts have three different prongs.

Telling voters about their rights and helping those turned away to get legal help may not be affected by the 100-foot rule. Groups also monitor post-voting ballot handling.

Lionel Leach, who is running the national Election Protection consortium's efforts in New Jersey, Nevada and Oregon, said his group will have 420 people handing out a "Voter's Bill of Rights" outside polling places around New Jersey - an activity that works fine 100 feet from the polls.

"For us, it's actually better to be outside," Leach said.

But for those concerned with the actual monitoring of election practices, being on the outside can be a problem.

Renee Steinhagen, executive director of New Jersey Appleseed, another group in the Election Protection group, said she's interested in the way voting machines are opened at the end of the day. Without being allowed to witness that, she said, it will be impossible for her group to know whether the ballots have been tampered with.

LOAD-DATE: November 2, 2004

DPA 16a